Supreme Court, U.S.
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No. 96-1378

In The

Supreme Court of the United States

October Term, 1996

DEREK ROCCO BARNABEI,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. SHOULD THIS COURT GRANT CERTIORARI TO REVIEW PETITIONER'S CLAIM THAT HE HAD A DUE PROCESS RIGHT TO A FORENSIC EXPERT, WHEN HE CONCEDED ON DIRECT APPEAL THAT THE SUPREME COURT OF VIRGINIA HAD APPLIED THE CORRECT LEGAL STANDARD TO THIS CLAIM?

II. SHOULD THIS COURT GRANT CERTIORARI TO REVIEW PETITIONER'S INSUBSTANTIAL CLAIM THAT *SIMMONS V. SOUTH CAROLINA*, 114 S.CT. 2187 (1994), SHOULD BE EXTENDED TO PAROLE ELIGIBLE DEFENDANTS?

TABLE OF CONTENTS

Page

OPINION BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

ARGUMENT I 8

PETITIONER'S CLAIM THAT THE SUPREME COURT OF VIRGINIA ERRED IN UPHOLDING THE TRIAL COURT'S DENIAL OF HIS MOTION FOR AN EXPERT FORENSIC PATHOLOGIST CONTRADICTS MUCH OF HIS OWN ARGUMENT ON DIRECT APPEAL AND OTHERWISE FAILS TO PRESENT A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION 8

ARGUMENT II 13

BARNABEI'S PAROLE ELIGIBILITY CLAIM DOES NOT RAISE A SUBSTANTIAL FEDERAL CONSTITUTIONAL ISSUE 13

CONCLUSION 16

TABLE OF CITATIONS

Page

CASES

Ake v. Oklahoma, 471 U.S. 68 (1985) 9

Caldwell v. Mississippi, 472 U.S. 320 (1985)..... 13

Cardinale v. Louisiana, 394 U.S. 437 (1969) 9

Cardwell v. Virginia, 115 S.Ct. 1826 (1995)..... 14

Harrison v. State, 635 So.2d 894 (Miss. 1994)..... 12

Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920 (1996), *cert. denied*, 117 S.Ct. 1092 (1997)..... 8, 9, 10

Keil v. Commonwealth, 222 Va. 99, 278 S.E.2d 826 (1981) 12

Maggio v. Williams, 464 U.S. 46 (1983) 9, 14

Michigan v. Long, 463 U.S. 1032 (1983)..... 16

Quesinberry v. Murray, 115 S.Ct. 2585 (1995) 14

Romano v. Oklahoma, 114 S.Ct. 2004 (1994) 15

Simmons v. South Carolina, 114 S.Ct. 2187 (1994) 13, 14, 15, 16

Springfield v. Kibbe, 480 U.S. 257 (1987)..... 9

Swann v. Virginia, 115 S.Ct. 234 (1994)..... 14

Texas v. Mead, 465 U.S. 1041 (1984).....10, 14

Tuggle v. Commonwealth, 228 Va. 493, 323 S.E.2d 539 (1984), *vacated on other grounds*, 471 U.S. 1096 (1985)..... 12

United States v. Alvarez-Sanchez, 114 S.Ct. 1599 (1994)..... 9

United States v. Johnston, 268 U.S. 220 (1925).....10, 14

TABLE OF CITATIONS – Continued

Page

Webb v. Webb, 451 U.S. 493 (1981) 9

Weeks v. Virginia, 116 S.Ct. 100 (1995) 14

Williams v. Virginia, 115 S.Ct. 2616 (1995) 14

Wright v. Virginia, 115 S.Ct. 1800 (1995) 14

OTHER AUTHORITIES

U.S.S.Ct. Rule 10 10

U.S.S.Ct. Rule 10.1 15

U.S.S.Ct. Rule 14.1(h) 9

Va. Code § 19.2-264.4 1

OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 252 Va. 161, 477 S.E.2d 270 (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are recited in the petition at 2 and the appendix to the petition at 42a-47a.

STATEMENT OF THE CASE

Barnabei was indicted in the Circuit Court of the City of Norfolk, Virginia for the rape and capital murder of Sarah Wisnosky on September 21-22, 1993. After an eleven day guilt phase trial, a jury convicted Barnabei of capital murder and rape on June 12, 1995. On June 13, 1995, the trial court conducted the sentencing proceeding on Barnabei's rape conviction, and the jury sentenced him to thirteen years on that offense. The sentencing phase of the capital murder trial then commenced, and on June 15, 1995, the jury sentenced Barnabei to death, based on both the statutory "future dangerousness" and "vileness" predicates. *See* Va. Code § 19.2-264.4. On September 15, 1995, the trial court imposed the death sentence on Barnabei.

Barnabei appealed to the Supreme Court of Virginia, which on September 13, 1996, affirmed Barnabei's convictions and death sentence. On November 1, 1996, the State Supreme Court denied Barnabei's petition for rehearing.

STATEMENT OF FACTS

Guilt Phase

Shortly before the start of fall classes in September, 1993, at Old Dominion University in Norfolk, Virginia, Barnabei contacted an advisor to the fraternities and sororities at Old Dominion University, and falsely informed her that he was a member of the Tau Kappa Epsilon (TKE) fraternity from New Jersey and "wanted to help out the group." (App. 2119-2122).[1] In the ensuing days, Barnabei began to associate with members and "pledges" of the TKE fraternity at ODU. Thereafter, Barnabei leased a room in a house in Norfolk, which was located near the ODU campus. All of his four roommates were past or present ODU students and either were TKE members or friends of such members. (App. 2486-2487, 2577, 2830-2831).

As Barnabei continued to ingratiate himself with members of the TKE fraternity, he became heavily involved in its "rush" activities in which it sought prospective new members. (App. 2150-2154, 2203-2205).

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[1] The facts relevant to the capital murder are recited in the opinion of the Supreme Court of Virginia on direct appeal. *Barnabei v. Commonwealth*, 252 Va. at 165-169, 477 S.E.2d at 272-275. References to the trial record will be made to the joint appendix on direct appeal and cited as "App. ___."

Among other things, Barnabei participated in "dorm storming," that is, he went to dormitories on the ODU campus and asked people to attend various TKE activities so that they would become interested in joining the fraternity. (App. 2152-2154, 2547-2548). During one such "dorm storming" effort, Barnabei encountered first semester students Sarah Wisnosky and Nicki Vanbelkum. (App. 1284-1285). Sarah was seventeen years old, was 5'5" inches tall, and weighed 95 pounds. (App. 1716).

On at least one occasion in September, Barnabei persuaded Sarah to go to his house, and she did not return to her dorm room until the following day. (App. 1297). At a "toga party" at the TKE fraternity on the following weekend, Barnabei "shunned [Sarah] the whole evening." (App. 2510, 2557). A TKE member and a "pledge" spoke that night with Sarah, who had become intoxicated, about her relationship with Barnabei. Sarah said: "He is alright, but I have had better." (App. 2258). Later that morning, Sarah slept in Barnabei's bed, but she later returned to her dorm room without incident. (App. 1335-1336). On neither of the two occasions in which Sarah came back to her dorm room on the following day did she tell Vanbelkum that she had had sexual relations with Barnabei. (App. 1342). On the day after the toga party, Barnabei "was bragging about his sex life" when the TKE member who had spoken with Sarah repeated what she had said to him in the hours after the toga party. (App. 2482). Barnabei then denied having had sexual intercourse with Wisnosky, stating that they had had oral sex. (App. 2220).

On the evening of September 21, 1993, Barnabei and Sarah, along with several others, watched a movie on

television at his house. (App. 2332-2334, 2420-2421). Barnabei then went to attend a pledges' meeting at a nearby house, while Sarah remained behind and watched the rest of the movie with several others. (App. 2592-2594). Barnabei ultimately returned home with Rolland Gee, a TKE pledge, at about 12:30 or 1:00 a.m. (App. 2438). Gee and Barnabei went to the latter's bedroom; there, Sarah was wearing a robe and smoking a cigarette. (App. 2439-2441). After the three listened to the radio for about 30 minutes, Gee left and returned home at about 2:00 a.m. That night, Barnabei played a compact disc much louder than usual, and two roommates pounded on his locked door for about five minutes to get him to turn it down. (App. 2529, 2855). Later, Barnabei rushed into the bedroom of his roommate Troy Manglicmont and demanded that he move his Jeep out of the driveway next to the house, because it was blocking the access of Barnabei's car to the street. (App. 2596-2597, 2601-2602). After Manglicmont moved his vehicle out of the way, Barnabei backed his own automobile out of the driveway so fast that he hit the side of the adjoining house. (App. 2603-2604).

During the course of the morning and afternoon of September 22, Barnabei borrowed, or tried to borrow, money from several acquaintances. (App. 2478-2479, 2784). Barnabei claimed that he was going out of town briefly "on business" and that he would repay the loans in the next several days. (App. 2299-2364, 2479).

Shortly after 6:00 p.m. on September 22, Wisnosky's body was found floating on the Lafayette River in Norfolk, about one mile from Barnabei's house. (App. 1258-1259). The medical examiner, Dr. Faruk Presswalla,

testified that his autopsy revealed that prior to her death Sarah had suffered at least ten blunt force injuries to the back and right side of her head. (App. 1720, 1767, 1800). Dr. Presswalla opined that a ballpeen hammer "or something else that is similar to that" had caused the injuries. (App. 1785).[2]

In addition, Presswalla found bruising of the introitus in the vagina as well as a laceration in the bottom part of the anal opening. (App. 1720-1721). The anal tear was about one-half inch long. (App. 1723). Presswalla stated that a woman would not normally incur such a tear and that a "forcible stretching of the anal opening" would have accounted for it. (App. 1724, 1729). While Presswalla concluded that Sarah had not been a virgin, he testified that the vaginal bruising which he had observed was not likely explained by this fact. "People don't get their vaginas bruised in normal sexual intercourse." (App. 1804-1805). Presswalla also opined that various possible innocent explanations for his findings (for example, constipation or horseback riding) were unlikely and that the anal tear was inflicted "very close to the time of her death. . . . ") (App. 1825-1833). Further, the vaginal bruising was ante-mortem. (App. 1729). Also, Presswalla

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[2] The Commonwealth introduced evidence that in the month before Sarah's murder, Barnabei had rented a room from Tina Smith in her Virginia Beach apartment. Barnabei had left Smith's home, without giving her any notice. Later, she determined that among the items which were missing from her home was a ballpeen hammer. (App. 2817-2819). Additionally, one of Barnabei's roommates at the Norfolk house testified that the two had used a ballpeen hammer in Barnabei's bedroom to put his waterbed together. (App. 2863-2864).

concluded it was unlikely someone had had sex with the victim after she had died. (App. 1734).

Additionally, Presswalla found petechiae on Sarah's face, which was "a manifestation of mechanical asphyxia." (App. 1737). Such things as the bruises on Wisnosky's neck and larynx suggested to Presswalla that she had been "manually strangled." (App. 1789). The injuries to her larynx also occurred before death. (App. 1791-1792).

Dr. Presswalla testified that the "primary cause [of death] was the head injuries due to the multiple blows. A contributory factor was the mechanical asphyxia." (App. 1788). Dr. Presswalla concluded, based on the degree of rigor mortis he had found in Sarah's arms and legs, that she would have had to have been put in the Lafayette River at about the time of her death. (App. 1751-1754). Dr. Presswalla determined that the most likely time of death was on the night of September 21-22, 1993. (App. 1762-1765).

The prosecution also put on evidence that, instead of returning to Norfolk as he had promised, Barnabei in the ensuing days rented a room in an apartment in Akron, Ohio. On December 19, 1993, local police ran a check on Barnabei's license plate and learned that there were outstanding warrants for the murder of Wisnosky. (App. 3000). Later that same morning, the police went to the apartment of Carla DeSantis and arrested Barnabei, who was staying with her. (App. 3006-3008).

Penalty Phase

The Commonwealth presented two witnesses in the sentencing phase. Sandra Joaquin testified about her "on and off" romantic relationship with Barnabei, which had begun when they were college students in 1989 and which had ended in August, 1990. (App. 3505-3507). Joaquin recounted various acts of violence which Barnabei had committed against her and others. (App. 3508-3527). On several occasions, Barnabei threatened to kill her. (App. 3527-3529).

Paula Barto, Barnabei's ex-wife, testified concerning their marriage. Again, Barnabei frequently committed violent acts against her and threatened to kill her. (App. 3550-3554). On one occasion, Bartos successfully resisted Barnabei's attempts to have anal intercourse with her, but on other occasions she finally was forced to submit to intercourse. (App. 3555-3559). When Paula finally separated from Barnabei in June, 1988, he left "many messages" on her answering machine in which he threatened various acts of violence. (App. 3563).

Barnabei presented mitigating evidence from various family members and friends. The jury then sentenced Barnabei to death, "finding after consideration of his prior history that there is a probability that he will commit criminal acts of violence that will constitute a continuing serious threat to society and/or that his conduct in committing the offense is outrageously or wantonly, vile, horrible, or inhuman that it involved torture, depravity of mind, or aggravated battery to the victim. . . . " (App. 3696)

ARGUMENT

I. PETITIONER'S CLAIM THAT THE SUPREME COURT OF VIRGINIA ERRED IN UPHOLDING THE TRIAL COURT'S DENIAL OF HIS MOTION FOR AN EXPERT FORENSIC PATHOLOGIST CONTRADICTS MUCH OF HIS OWN ARGUMENT ON DIRECT APPEAL AND OTHERWISE FAILS TO PRESENT A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION.

Barnabei, who was convicted of capital murder in the commission of, or subsequent to, rape, contends that the trial court erred in denying his motion for the appointment of a forensic pathologist concerning the cause of Wisnosky's bruises and injuries. Barnabei says that certiorari review is necessary in order to clarify the standard governing an indigent criminal defendant's request for expert assistance. The record establishes, however, that Barnabei's present claim is substantially inconsistent with his argument on direct appeal and otherwise does not raise a significant federal constitutional issue.

On direct appeal, the Supreme Court of Virginia, applying the standard it had adopted in another opinion issued on the same day, *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996), *cert. denied*, 117 S.Ct. 1092 (1997), held that Barnabei failed to establish " 'that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial.' " 252 Va. at 170-171, 477 S.E.2d at 275-276. Far from challenging the Virginia Supreme Court's application of the *Husske* test to this case, in his petition for rehearing Barnabei instead stated that the state court had "formally

embraced the federal right previously established in *Ake v. Oklahoma*, 471 U.S. 68 (1985). . . . Barnabei argued, both in his brief and in oral argument that the [Virginia Supreme] Court adopt the very holding it did in *Husske*. He did so because it is the law and because the application of the *Husske* rule to Barnabei's facts require a reversal because *these requirements were met in Barnabei's trial*. . . . " (Pet. Reh. at 5, emphasis in original). Yet, Barnabei now says that "the rigid standard employed by the court below is especially inappropriate where, as here, a defendant faces the death penalty." (Pet. at 19).

Thus, on direct appeal Barnabei did not merely default on the present argument, but he raised a claim largely antithetical to it. *See generally Springfield v. Kibbe*, 480 U.S. 257 (1987); *Webb v. Webb*, 451 U.S. 493 (1981); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). *See also United States v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1604 n.5 (1994); U.S.S.Ct. Rule 14.1(h) (petitioner must establish that federal question "was timely and properly raised so as to give this Court jurisdiction to review the judgment").[3]

Moreover, Barnabei made clear on direct appeal that application of the concededly valid *Husske* rule necessitated a case-specific, fact-specific analysis. In his petition for rehearing, Barnabei asserted that the Virginia

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[3] It is noteworthy that the petitioner in the *Husske* case similarly argued in his certiorari petition that this Court should grant certiorari to resolve the claimed conflict in the lower courts regarding an indigent defendant's due process right to expert assistance. This Court's denial of certiorari in *Husske*, 117 S.Ct. 1092 (1997), hardly suggests that Barnabei's argument is anymore "cert-worthy." *See generally Maggio v. Williams*, 464 U.S. 46 (1983).

Supreme Court's ruling in *Husske* reflected its acknowledgment that an indigent defendant is constitutionally entitled to the " 'basic tools necessary to an adequate defense.' What those tools might be varies from case to case. . . . " (Pet. Reh. at 5). Indeed, in his petition for rehearing, Barnabei's complaint was that the Supreme Court of Virginia had misapplied the *Husske* test to the facts of this case. It is axiomatic that certiorari does not lie to review such a fact-specific claim as Barnabei's, the adjudication of which can affect only the particular case under review. *See Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.); *United States v. Johnston*, 268 U.S. 220, 227 (1925); U.S.S.Ct. Rule 10 ("certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

Finally, the record in this case demonstrates that Barnabei was not constitutionally entitled to the appointment of an expert forensic pathologist concerning the nature of the victim's injuries, nor was he prejudiced by the denial of his motion. Prior to trial, Barnabei moved to exclude the prospective testimony of Dr. Presswalla, the chief medical examiner who had conducted the autopsy of Wisnosky, concerning whether force had been used to inflict any of the injuries to her vagina or anus. (App. 88). Barnabei based his motion *in limine*, in part, "upon the subjective nature of Dr. Presswalla's opinion [and] the multitude of other explanations for the injuries which are consistent with consensual sex. . . . " (App. 88).

At a subsequent hearing on Barnabei's motion *in limine*, defense counsel asserted that the medical examiner's testimony would not be founded upon a reasonable

degree of medical certainty, because he could not pinpoint the possible causes of the anal and vaginal injuries. (App. 406-408). During the same hearing, defense counsel stated that he had interviewed Presswalla who indicated various possible causes for the decedent's injuries. (App. 375, 407-408). Far from arguing that only a defense expert could effectively rebut Presswalla's testimony at trial, defense counsel instead contended that Presswalla's testimony should be excluded as overly speculative. (App. 408). Thereafter, Presswalla testified concerning his findings that Wisnosky had suffered injuries to her vagina and anus and elaborated on his conclusion that "forcible" penetration accounted for the injuries. (App. 409-414).

Throughout his direct testimony at trial, Presswalla merely described the vaginal and anal injuries which he had observed during the autopsy. (App. 1720-1723, 1726-1729). Presswalla never remotely opined as to whether any sexual intercourse had been consensual; rather, he merely described the "violence" or "forcible penetration" which had caused the contusions and tears that he described. (App. 1727-1729). It was defense counsel, on cross-examination, who repeatedly questioned Presswalla concerning the possible reasons for the injuries. (App. 1825-1833). Presswalla expressly made clear that his use of the term "forcible" had merely been a medical reference to "the actual force that has to be applied to have the insertion take place." (App. 1827). Beyond this, the defense thoroughly cross-examined Dr. Presswalla at trial about his findings, getting him to concede, for example, that any of several non-criminal actions might have accounted for the injuries. (App. 1825-1833).

Significantly, in moving to strike the prosecution's evidence on the rape charge, Barnabei relied upon Dr. Presswalla's own testimony that he used the word "force" as a medical, not legal, term. (App. 3215). Thereafter, during closing arguments the prosecutor, contrary to Barnabei's present assertion, did not rely "entirely on testimony of the medical examiner." (Pet. at 4). Instead, throughout his closing argument the prosecutor, consistent with Virginia law, also emphasized the brutality of Wisnosky's murder as probative of the fact that Barnabei had also raped her. (App. 3296, 3411). *See also Tuggle v. Commonwealth*, 228 Va. 493, 512, 323 S.E.2d 539, 550 (1984), *vacated on other grounds*, 471 U.S. 1096 (1985); *Keil v. Commonwealth*, 222 Va. 99, 101-105, 278 S.E.2d 826, 827-830 (1981). In response, defense counsel quoted directly from Presswalla's trial testimony that "generic rough sex" could have accounted for the force to the victim's vaginal and anal areas which he had observed. (App. 3329-3330, 3391).

Thus, the record in this case readily reflects that the appointment of an expert forensic pathologist for the defense was unnecessary to vindicate Barnabei's right to a fair trial. As a result of Dr. Presswalla's pre-trial discussions with defense counsel and his testimony at the pretrial hearing, Barnabei was well-equipped to cross-examine him at trial. Further, unlike, for example, the expert in *Harrison v. State*, 635 So.2d 894 (Miss. 1994), Presswalla never testified that Barnabei "raped" Wisnosky. On the contrary, his conclusions were significantly more limited. To the extent that Barnabei's own cross-examination of Presswalla resulted in any elaboration upon the examiner's opinions as to the possible causes of the victim's

genital injuries, Barnabei can hardly rely upon this as a basis for asserting that he was constitutionally entitled to a forensic expert. In sum, much like the defendant in *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985), Barnabei's "undeveloped assertions that the requested assistance would [have been] beneficial" at trial hardly suffices to establish any due process violation.

II. BARNABEI'S PAROLE ELIGIBILITY CLAIM DOES NOT RAISE A SUBSTANTIAL FEDERAL CONSTITUTIONAL ISSUE.

Weeks says that this Court should grant certiorari in order to resolve two allegedly unanswered questions in *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994). In *Simmons*, a plurality of the Court held "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." 114 S.Ct. at 2190. Supposedly, this Court should grant certiorari in this case in order to determine whether *Simmons* should be extended to parole eligible defendants, like Barnabei, and whether the Eighth Amendment also bestows a similar right on a defendant to present evidence and argument concerning his parole status. For several reasons, Barnabei's claim does not present a substantial federal constitutional question and thus is not a proper vehicle for this Court's review.

On direct appeal, Barnabei advanced a much more narrow, case-specific argument than in the present petition. There, Barnabei asked the Supreme Court of Virginia

"to decide a critical issue which is a fairly narrow one. . . . Barnabei's case involves unique facts which make the general rule [in Virginia limiting *Simmons* to parole ineligible defendants] inapplicable: 1) defense counsel requested the jury be provided with accurate parole information; 2) the Commonwealth urged that the defendant posed a future danger to society at large; and 3) the jury specifically asked about the defendant's parole eligibility." (Def. Br. at 48). By Barnabei's own assessment, then, this case involves "unique" facts and, virtually by definition, this Court's disposition of his claim would provide little guidance to other courts. Moreover, the case-specific, fact-specific claim which Barnabei advanced on direct appeal is just the kind which this Court has made clear it will not review. *See Texas v. Mead*; *United States v. Johnston*, 268 U.S. at 227.

Moreover, Barnabei is hardly the first Virginia death row prisoner to assert that *Simmons* should be extended to afford both a due process and a Eighth Amendment right to present evidence and argument concerning the parole status of a parole eligible defendant. Significantly, however, this Court has consistently declined to review substantially similar arguments raised by other Virginia death row petitioners. *See, e.g., Weeks v. Virginia*, 116 S.Ct. 100 (1995); *Williams v. Virginia*, 115 S.Ct. 2616 (1995); *Quesinberry v. Murray*, 115 S.Ct. 2585 (1995); *Cardwell v. Virginia*, 115 S.Ct. 1826 (1995); *Wright v. Virginia*, 115 S.Ct. 1800 (1995); *Swann v. Virginia*, 115 S.Ct. 234 (1994). This Court's repeated denials of similar *Simmons* arguments in these cases provide "ample evidence" that Barnabei's argument does not warrant the granting of certiorari. *See Maggio v. Williams*, 464 U.S. at 51-52.

Finally, even if this Court were considering the present *Simmons* claim for the first time, Barnabei's contention that *Simmons* should be extended to parole eligible defendants is groundless. Accordingly, Barnabei necessarily cannot demonstrate any special or important reasons for the granting of certiorari. *See* U.S.S.Ct. Rule 10.1 (writ "will be granted only when there are special and important reasons therefor").

In *Simmons*, both the plurality and concurring opinions made abundantly clear that, except in those cases whose future dangerousness is in issue and the defendant is not parole eligible, a State otherwise retains the right to prohibit parole eligibility information. *See* 114 S.Ct. at 2196 (plurality) ("In a State in which parole is available, how the jury's knowledge of parole availability will affect the [sentencing] decision . . . is speculative, and we shall not lightly second-guess a decision whether to inform a jury . . . regarding parole. States reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury"); *id.* at 2200 (O'Connor, J., concurring) ("In a State in which parole is available, the Constitution does not require . . . jury consideration of that fact.").[4] Accordingly, because Barnabei concededly would have been eligible for parole after 25 years, his claim, irrespective of its constitutional trappings, raises nothing more than a non-

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[4] Insofar as Justice O'Connor's concurring opinion may be deemed narrower than the plurality opinion of Justice Blackmun, her position (joined by the Chief Justice and Justice Kennedy) must be regarded as controlling. *See Romano v. Oklahoma*, 114 S.Ct. 2004, 2010 (1994) (controlling effect given to concurring opinion that provides requisite fifth vote).

reviewable issue of state law. *See generally Michigan v. Long*, 463 U.S. 1032, 1038 (1983).

Finally, petitioner's Eighth Amendment argument provides even less reason for this Court to grant review in this case. First, the plurality in *Simmons* explicitly disavowed any reliance upon the Eighth Amendment as a basis for its holding. 114 S.Ct. at 2193 n.4. Not surprisingly, Weeks has not cited one post-*Simmons* case holding that the Eighth Amendment affords a capital murder defendant the right to inform the jury of his parole eligibility status.

CONCLUSION

For the foregoing reasons, Barnabei's claims raise little more than fact-specific arguments of the kind which this Court routinely declines to review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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